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DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-197205 **DATE:** May 16, 1980

MATTER OF: Rafael F. Arroyo - Entitlement to Home Leave Travel--Place of Actual Residence

DIGEST: Correction of error in overseas transfer agreement may be made when clearly shown that place of actual residence was other than the place named in the agreement. Place of actual residence at time of transfer must be determined by agency on basis of all available facts. Since record does not clearly show why FAA corrected residence determination, the agency should make factual determination on employee's residence. If agency determines employee's residence is Miami, Florida, he is entitled to home leave and round-trip travel expenses, if otherwise proper.

The issue to be decided here is whether an employee's post of duty in Miami, Florida, prior to his transfer to Puerto Rico is to be considered his place of "actual residence" for travel at Government expense for home leave purposes under the provisions of 5 U.S.C. § 5728(a) (1978).

This decision is in response to a request, pursuant to 4 C.F.R. § 21 (1979), from the Professional Air Traffic Controllers Organization (PATCO) concerning the entitlement of Rafael F. Arroyo to biennial travel and home leave. Although a representative of the Federal Aviation Administration (FAA) was served with a copy of the union's request, the agency has not responded. Thus, our decision is based on the facts as provided by the PATCO.

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On January 1, 1969, Mr. Rafael F. Arroyo entered into Government service as a GS-5 AC&W Operator, Puerto Rico Air National Guard, at the Punta Salivas Radar Site in Puerto Rico. On September 2, 1969, Mr. Arroyo was selected for a career-conditional appointment with FAA as an Air Traffic Control Specialist, GS-6, with a duty assignment at the San Juan, Puerto Rico, Air Route Traffic Control Center. Mr. Arroyo was considered as a "local hire" and his Standard Form 50 states that he was ineligible for round-trip travel. On January 4, 1976, Mr. Arroyo was promoted under the agency's merit promotion program to an Air Traffic Control Specialist, GS-13, and given

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a permanent change of station to Miami, Florida. The FAA has advised us that it paid Mr. Arroyo's travel expenses and that he executed the usual travel agreement to remain in the Government service for 12 months after his transfer. Almost 2 years later, on December 4, 1977, Mr. Arroyo bid and was laterally transferred under the merit promotion program to another Air Traffic Control Specialist, GS-13, position at Isla Verde Air Traffic Control Tower, Puerto Rico, where he is presently stationed.

In connection with the transfer back to Puerto Rico, Mr. Arroyo submitted a "Statement as to Place of Actual Residence at Time of Appointment or Transfer Overseas," dated August 29, 1977, in which he claimed Miami, Florida, as his actual residence. The document contained an underlined printed notice to the employee that "[t]he place of actual residence claimed by the employee is subject to review and correction by the agency." In the blank space provided for agency approval of the place of residence, both Miami and San Juan were written in and crossed out, and Miami, Florida, is written in as the approved place, with a note stating that the change was made December 2, 1977. Similarly, the overseas employment and transportation agreement signed by the employee and FAA in August 1977 contains a typewritten note stating that it was amended on December 2, 1977, to show Miami in lieu of San Juan for home leave and return transportation purposes.

The FAA notified Mr. Arroyo, by memorandum dated August 16, 1979, that the establishment of his actual place of residence as Miami, Florida, in December 1977 had been an administrative error and that as a "local hire" his actual place of residence was San Juan, Puerto Rico. The FAA memorandum concluded by advising Mr. Arroyo that his entitlement to home leave and biennial travel would be withdrawn and that his agreement would be corrected to reflect San Juan as his place of actual residence.

The PATCO says that "local hires" are being discriminated against by the FAA in the application of its rules and regulations. It says the effect of FAA's position is that a controller from Puerto Rico cannot change his actual residence whereas a controller from the continental United States can change his residence at any time. The PATCO also says that 45 Comp. Gen. 136 (1975), relied on by the FAA, is not applicable here since:

> "* * * Mr. Arroyo was promoted to the Miami Center on a permanent assignment basis, through the Agency's merit promotion system. He did not go to Miami under any employment agreement and he had no return rights back to San Juan. He had no guarantee that at any future date he could transfer back to San Juan. He has purchased a home in Miami and he and his family have made Miami their permanent residence. In 1977, when Mr. Arroyo transferred back to Puerto Rico, it was the result of another merit promotion bid. He transferred to San Juan for the convenience of the government under a 24-month employment agreement with an extension subject to the approval of the FAA area manager. He was employed in San Juan incidental to a government assignment. For that reason San Juan cannot be designated as his place of actual residence. * * *"

PATCO concludes its letter by asking us to reverse the FAA decision to withdraw home leave and biennial travel. In order to answer this request adequately, we shall begin with a discussion of the applicable law and regulations.

The authority for the granting of round-trip travel expenses for an employee upon completion of a tour overseas is derived from section 5728(a) of title 5 of the United States Code, which provides that:

> "Under such regulations as the President may prescribe, an agency shall pay from its appropriations the expenses of round-trip travel of an employee, and the transportation of his immediate family, but not household goods, from his post of duty outside the continental United States to the place of his actual residence at the time of appointment or transfer to the post of duty, after he has satisfactorily completed an agreed period of service outside the continental United States and is returning to his actual place of residence to take leave before serving another tour of duty at the same or another post of duty outside the continental United States under a new written agreement made before departing from the post of duty." (Emphasis supplied.)

Thus, the statute requires that a determination be made of the employee's actual residence at the time of transfer or appointment in order to entitle him to return round-trip travel expenses. The Federal Travel Regulations (FTR) (FPMR 101-7) (May 1973) provides guidance to the agency, in paragraph 2-1.5g(3), as follows:

"(3) Actual place of residence designation.

"(a) Designation by employee. When an employee is selected for transfer or appointment to a post of duty outside the conterminous United States, the place of actual residence shall be determined at the time of selection and designated in the written agreement prescribed in 2-1.5a(1)(b) to remain in the Government service for a minimum period of time prescribed by the agency head pursuant to law. An employee hired locally at a location outside the conterminous United States who claims residence at another location in the United States or its possessions or in the Commonwealth of Puerto Rico at time of appointment, shall designate in writing the claimed place of actual residence for the consideration of agency officials.

"(b) Determination by agency official. Determination of the place of actual residence shall be made by an authorized agency official on the basis of all the facts in the record. When there is doubt as to the place of actual residence, the employee is responsible for supplying any further information necessary to support designation of the claimed place of actual residence.

"(c) Guidance in determination of residence. While it is not feasible to establish rigid standards for what constitutes a place of residence, the concept of residence represented in an existing statutory provision (8 U.S.C. 1101(33)) may be used as general guidance. This concept views residence as the place of general abode, meaning the principal, actual dwelling place in fact, without regard to intent. Determination of the place of actual residence is

primarily an administrative responsibility, and the place constituting the actual residence must be determined upon the factual circumstances in each case. Examples of factors which shall be considered, whenever applicable, by agency officials charged with this responsibility are:

* * * * *

"(ii) The place at which the employee physically resided at time of selection for appointment or transfer frequently constitutes the place of actual residence and shall be so regarded in the absence of circumstances reasonably indicating that another location may be designated as the place of actual residence.

"(iii) Designation of a place of actual residence in an official document signed by the employee earlier in Government employment shall be regarded as originally intended to be a continuing designation, and the burden is upon the employee to establish clearly that the earlier designation was in error or that later circumstances entitle a different designation to be made. After an employee has been transferred or appointed to a post of duty outside the conterminous United States, the location of the place of actual residence incorporated in the official records of such employment shall be changed only to correct an error in the designation of residence.

"(iv) Presence in the individual's work history of a representative amount of full-time employment at or in the immediate geographic area of the location designated as place of actual residence is a significant factor, but lack of such history does not preclude the designation of the location as place of actual residence.

"(v) The chronological record of individual or family association with a locality is usually significant only in conjunction with an analysis of other circumstances explaining the nature

of such association. Frequent or extended visits to a locality must be evaluated in relation to the nature of the area itself. For example, vacation visits to a vacation resort area, without the added support of other factors, should not be regarded as adequate to establish a place of actual residence.

"(vi) Recognition and exercise by the employee of the privileges and duties of citizenship in a particular jurisdiction, such as voting and payment of taxes on income and personal property are factors for consideration, but agency application of standards about place of residence should not be such as to discourage employees from property ownership or participation in community affairs at a nonforeign location outside the conterminous United States."

We have consistently construed the above-quoted regulations as placing the responsibility for determining the place of actual residence of an employee on the administrative agency and as requiring the determination to be made on the basis of all available facts. 45 Comp. Gen. 136 (1965); 39 id. 337 (1959); 37 id. 848 (1958); 35 id. 101 (1955). Such a determination must, of necessity, be based on the facts of each case, and ordinarily our Office will not question any reasonable determination made by the agency of the employee's actual residence. 35 Comp. Gen. 244, 246 (1955).

In the present case, we note that almost 2 years elapsed between the time Mr. Arroyo initially prepared his overseas travel agreement and the date the FAA decided to change his residence designation. Paragraph 2-1.5g(3)(a) of the FTR states that the place of actual residence shall be determined at the time of selection and designated in the written agreement. As shown above, Mr. Arroyo's agreement was amended 2 days before the effective date of his transfer to show Miami as his place of actual residence. Thus, we are faced with the question of whether or not the changed determination made by the FAA, some 2 years later, was in fact reasonable.

In 39 Comp. Gen. 337, supra, we stated that the "law and regulations do not preclude correction of errors in the overseas

assignment or transfer records, when it is later shown clearly that, in fact, the place of actual residence was other than the place named in the agreement and related papers." See also James E. Brown, B-182226, January 27, 1975; Gerald W. Stockton, B-178654, April 8, 1974. However, the facts in this case do not clearly show how or why the FAA determined that Mr. Arroyo's actual place of residence was San Juan, Puerto Rico.

Mr. Arroyo resided in Miami, Florida, at the time of his transfer and he so designated it as his place of residence. One of the guidelines in the FTR, paragraph 2-1.5g(3)(c)(ii), states that the place at which the employee physically resided at the time of his selection for transfer frequently constitutes the place of actual residence and shall be so regarded in the absence of circumstances reasonably indicating that another location may be designated as the place of actual residence. The papers submitted by PATCO indicate that the FAA made its determination in 1979 to change the place of residence from Miami to San Juan on the basis that Mr. Arroyo was originally a "local hire," and on the advice of its regional counsel.

The counsel's advice was predicated on our decision in 45 Comp. Gen. 136 (1965), rather than on an independent determination of Mr. Arroyo's residence based on the facts. In that decision, we upheld an agency's determination of actual residence based on the evidence presented. 45 Comp. Gen. 136 does not preclude the FAA from finding that Miami is the place of residence in Mr. Arroyo's case. The fact that Mr. Arroyo was originally a "local hire" should not be made the sole criterion of residency determination because that would have the effect of preventing a local hire from ever establishing a different actual place of residence. Such action on the part of the agency would be arbitrary and capricious.

The FAA should make a factual determination as to Mr. Arroyo's actual residence after giving him a full opportunity to submit further evidence to support his claim. If the agency determines that the actual residence is in fact Miami, Florida, Mr. Arroyo is entitled to round-trip travel expenses and home leave, provided the other provisions of the statutory authority are met.

Accordingly, action should be taken by the FAA consistent with this decision.

Milton J. Socolar

Acting Comptroller General
of the United States